

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION**

UNITED STATES OF AMERICA

v.

CRIMINAL NO. CR

[DEFENDANT]

COURT S INSTRUCTIONS

INTRODUCTION

Members of the jury, you have unanimously found the defendant, _____, guilty of a violation of Title 18, United States Code, Section 2113 (a), (d), and (e) and Title 18 United States Code Sections 924 (j) and 1951, offenses for which the death penalty may be imposed under the law.

Whether or not the circumstances in these cases justify imposing a sentence of death is a decision that the law leaves entirely to you, and the Court is required by law to sentence the defendant in accordance with your decision. You should not take anything I may say or do during this phase of the trial as indicating what I think of the evidence or what I think your verdict should be.

Terms that you have already heard and will hear throughout this phase of the case are "proportionality factors, aggravating factors" and mitigating factors. These factors have to do with the defendant's intent and role in the commission of the offenses,

the circumstances of the crimes, and the personal traits, character or background of the defendant and the victims. A "statutory proportionality factor" is one or more of four factors listed in the statute which concern the defendant's intent and role in committing an offense of which he has been convicted. These factors include things such as intentionally killing the victim or intentionally participating or engaging in certain acts, intending that a person would be killed or knowing that a person would or could be killed.

The word "aggravate" means "to make worse or more offensive" or "to intensify." The word "mitigate" means "to make less severe" or "to moderate." An aggravating factor, then, is a specified fact or circumstance which would tend to support imposition of the death penalty. A mitigating factor is any aspect of a defendant's character or background, any circumstance of the offense, or any other relevant fact or circumstance which might indicate that the defendant should not be sentenced to death.

In the death penalty statute, a number of aggravating factors are listed. These are called statutory aggravating factors. As I instructed you earlier, before you may consider imposition of the death penalty for either count of conviction, you must find that the government has proven at least one of these aggravating factors specifically listed in the death penalty statute, and your finding must be unanimous and beyond a reasonable doubt. There may also be non-statutory aggravating factors, which are those factors not specifically set out in the death penalty statute, but which you are permitted to consider under the law. Again, your finding that any non-statutory aggravating factor exists must be unanimous and beyond a reasonable doubt.

In the death penalty statute, a number of mitigating factors are listed. These are called "statutory mitigating factors. There may also be "non-statutory mitigating factors," which are those factors not specifically set out in the death penalty statute, but which you are permitted to consider under the law. The defendant has the burden of proving any mitigating factors. However, there is a different standard of proof as to mitigating factors. You need not be convinced beyond a reasonable doubt about the existence of a mitigating factor; you need only be convinced that it is more likely true than not true in order to find that it exists. A unanimous finding is not required. Any one of you may find the existence of a mitigating factor, regardless of the number of other jurors who may agree, and any one who so finds may weigh that factor.

If you have unanimously found that at least one statutory proportionality factor and at least one statutory aggravating factor exists, all of you then must weigh the aggravating factor (or factors) you have all found to exist and each of you must weigh any mitigating factor (or factors) you individually have found to exist, to determine the appropriate sentence for each count of the indictment. I will give you detailed instructions regarding the weighing of aggravating and mitigating factors before you begin your deliberations. However, I instruct you now that only the aggravating and mitigating factors--not the proportionality factors--are to be weighed in determining the appropriate sentence; and you must not simply count the number of aggravating and mitigating factors and reach a decision based on which number is greater-you must consider the weight and value of each factor and make your decision accordingly as to each count.

BURDEN OF PROOF

As I have previously instructed you, the government must meet its burden of proof beyond a reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt. The defendant does not have the burden of disproving the existence of anything the government must prove beyond a reasonable doubt. The burden is wholly upon the government; the law does not require the defendant to produce any evidence at all.

It is the defendant's burden to establish any mitigating factors, by a preponderance of the evidence. To prove something by the preponderance of the evidence is to prove that it is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence in terms of quality and persuasive value, not the amount of evidence. The preponderance of the evidence is not necessarily determined by the greater number of witnesses or exhibits presented by the government or the defendant. It is determined by considering all of the evidence and deciding which of the evidence is more believable. If, on any issue in the case, the evidence is equally balanced, you cannot find that issue has been proved. To prove something by the preponderance of the evidence is a lesser standard of proof than proof beyond a reasonable doubt.

DELIBERATIVE PROCESS

Let me now discuss with you the deliberative steps you should follow in considering the very serious issue before you:

FIRST--you must consider whether the government has proven, beyond a reasonable doubt and to your unanimous agreement, that the defendant was at least eighteen-years-old at the time of the capital offenses for which you have found him guilty. I will discuss this determination of the age of the defendant in more detail later in these instructions.

SECOND--you must consider whether the government has proven, beyond a reasonable doubt and to your unanimous agreement, one or more factors from the "statutory *proportionality* factors established by Congress, as to each of the capital offenses for which you have found the defendant guilty. I will discuss these statutory proportionality factors in more detail later in these instructions.

THIRD--you must consider whether the government has proven, beyond a reasonable doubt and to your unanimous agreement, one or more of the statutory aggravating factors, as to each of the capital offenses for which you found the defendant guilty. I will discuss these statutory aggravating factors in more detail later in these instructions.

FOURTH--you must similarly consider whether any non-statutory aggravating factors identified by the government have been proven to your unanimous agreement beyond a reasonable doubt. I will also discuss these non-statutory aggravating factors in detail later in these instructions.

FIFTH--you must consider whether any of you find that any statutory mitigating factors or non-statutory mitigating factors have been proven by a preponderance of the

evidence presented by the defendant. I will again discuss these statutory and non-statutory mitigating factors later in these instructions.

SIXTH--all of you must then weigh the aggravating factors you have all found to exist and each of you must weigh any mitigating factors you individually have found to exist, to determine the appropriate sentence. You must decide whether the aggravating factor(s) which have been found to exist sufficiently outweigh the mitigating factor(s) so as to justify imposing a sentence of death on the defendant or, in the absence of any mitigating factor(s), whether the aggravating factors alone are sufficient to justify imposing a sentence of death on the defendant. This process must be done regarding each count of the indictment. I will discuss this weighing of aggravating and mitigating factors in more detail later in these instructions.

SPECIAL FINDINGS AND VERDICT FORM

As you retire to begin your deliberations, you will be provided with two Special Verdict Forms to record your determinations.

You are required to record your determinations as to the defendant's age at the time of the offenses, and the existence *or* non-existence of each statutory proportionality factor, statutory aggravating factor, and non-statutory aggravating factor. A Special Verdict Form will be provided for each count of the indictment. Section I of each Special Verdict Form contains space for you to record your findings on the defendant's age at the time of the offense. Section II of each Special Verdict Form contains space to record your written findings on statutory proportionality factors. Section III of each Special Verdict

Form contains space to record your written findings on statutory aggravating factors.

Section IV of each Special Verdict Form contains space to record your written findings on non-statutory aggravating factors.

In addition, you have the option to return written findings as to the existence or nonexistence of each mitigating factor, if you choose, but you are not required to return such findings. Section V of each Special Verdict Form contains space to record written findings on mitigating factors, if you choose to do so. If you choose not to do so, cross out each page of Section V with a large X. In this case, the defendant has requested that you record written findings on the mitigating factors.

Because any one juror may find the existence of any mitigating factor, regardless of the number of others who may agree, space is provided for you to note how many jurors find any particular mitigating factor. You must be unanimous as to the existence of any aggravating factor.

Section VI of each form is where you should record your ultimate determination as to the sentence to be imposed, and each juror should sign and date the form.

AGE OF THE DEFENDANT

Title 18, United States Code, Section 3591, provides that:

[N]o person may be sentenced to death who was less than 18 years of age at the time of the offense.

Thus, before you may consider whether or not to impose the death penalty, you must first unanimously determine beyond a reasonable doubt that the defendant was eighteen years of age or older at the time of the offenses.

If you unanimously make that finding, you should so indicate in Section I of the Special Verdict Forms and continue your deliberations. If you do not unanimously make that finding, you should so indicate in Section I of the Special Verdict Forms, and no further deliberations will be necessary in regard to the defendant.

The government contends that the defendant, _____, was born on March 24, 1979, became eighteen years old on March 24, 1997, and committed the capital offense in count one on or about November 7, 1998. The government further contends he committed the capital offense in count two on or about December 14, 1998.

STATUTORY PROPORTIONALITY FACTORS

Next you must consider as to each count whether you are unanimously persuaded beyond a reasonable doubt that the government has proven any of the statutory proportionality factors. The statutory proportionality factors focus on the defendant's intent and role in committing the offense. You may find more than one statutory proportionality factor was present. You must find at least one of the statutory proportionality factors in each count alleged by the government in order to further consider imposing the death penalty on the defendant for that count. Again, you may find that more than one of these factors has been established. Indicate the statutory proportionality factor(s) you have found, if any, in Section II of the Special Verdict Forms. Again, if you do not find at least one of the alleged statutory proportionality factors present, your deliberations as to the death penalty for that count are complete and the Court shall impose a sentence as authorized by law. If you do not find a statutory

proportionality factor, indicate your answer in Section II and then proceed to Section VII of the Special Verdict Forms.

In this case, the government alleges the following two statutory proportionality factors apply to each count of conviction:

1. Intentional Act to Take Life or Use of Lethal Force. The defendant intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connections with a person, other than one of the participants in the offense, and the victim died as a direct result of that act.

2. Reckless Disregard of Life. The defendant intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of that act.

Again, the statutory proportionality factors are to guide you in assessing the defendant's intent and role in committing the offenses. You must unanimously find beyond a reasonable doubt that one or more of these factors is proven by the government regarding each count in order to further consider imposition of the death penalty. You may find that more than one of these factors is established. You should indicate your findings in Section II of your Special Verdict Forms. I will now define for you the two statutory proportionality factors.

INTENTIONAL ACT TO TAKE LIFE OR USE OF LETHAL FORCE

Title 18, United States Code, Section 3591(a)(2)(C), provides that a defendant who has been found guilty of a capital offense may become eligible for the death penalty if the jury determines beyond a reasonable doubt that:

The defendant intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of that act.

To establish this factor, the government must prove, in essence, that the defendant deliberately committed or participated with others in committing a certain act(s) with a conscious desire that a person would be killed or that lethal force would be employed against a person, who was not a participant in the offense, which act(s) then caused the victim's death. Contemplating that the life of a person would be taken means that the defendant was conscious and aware that his conduct might have this result. This may be proved by the defendant's conduct and by all the facts and surrounding circumstances. The words "lethal force" should be given their ordinary, everyday meaning of being an act of violence capable of causing death. The words "participant in the offense" should be given their ordinary, everyday meaning of taking part in committing the crime.

RECKLESS DISREGARD OF LIFE

Title 18, United States Code, Section 3591(a)(2)(D), provides that a defendant who has been found guilty of a capital offense may become eligible for the death penalty if the jury determines beyond a reasonable doubt that:

The defendant intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of that act."

To establish this factor, the government must prove, in essence, that the defendant deliberately committed certain act(s) with reckless disregard or extreme indifference for human life, "Grave risk of death, in this context, means a significant and considerable possibility that a person other than one of the participants in the crime might be killed.

Knowingly creating such a risk means that the defendant was conscious and aware that his conduct might have this result. Knowledge may be proved by the defendant's conduct and by all the facts and surrounding circumstances. The words participant in the offense should be given their ordinary, everyday meaning of taking part in committing the crime.

An act of violence is an act: (1) that involves using, attempting to use, or threatening to use physical force against the person or property of another person; or (2) that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the act.

STATUTORY AGGRAVATING FACTORS

Next you must consider whether you are unanimously persuaded beyond a reasonable doubt that the government has proven any of the statutory aggravating factors. The statutory aggravating factors focus on the nature and circumstances of the crimes, the conduct of the defendant, and the defendant's past criminal record, if any. You must find at least one of the statutory aggravating factors alleged by the government in each count in

order to further consider imposing the death penalty on the defendant. Indicate the statutory aggravating factor(s), if any, that you have found in Section III. If you do not find at least one statutory aggravating factor present, your deliberations as to the death penalty for the defendant regarding that count are complete and the Court shall impose a sentence of life imprisonment without the possibility of release. If you do not find at least one statutory aggravating factor, indicate your answer in Section III and proceed to Section VII of the Special Verdict Form for that count.

In this case, the government alleges the following two statutory aggravating factors for the capital offense in count one:

1. Heinous, cruel, or depraved manner of committing offense. The defendant, _____, committed the offense in an especially heinous, cruel, or depraved manner in that it involved torture or serious physical abuse to the victim, _____. Title 18, United States Code 3591 (c)(6).

2. Pecuniary Gain. The defendant, _____, committed the offense as consideration for the receipt, and in the expectation of the receipt of something of pecuniary value, specifically money. Title 18, United States Code 3592(c)(8).

The government alleges the following statutory aggravating factor for the capital offense in count two:

1. Pecuniary Gain. The defendant, _____, committed the offense as consideration for the receipt, and in the expectation of the receipt of something of pecuniary value, specifically money. Title 18, United States Code 3592(c)(8).

Again, the statutory aggravating factors are to guide you in assessing the nature and circumstances of the crimes, the conduct of the defendant, and the defendant's past criminal record, if any. You must unanimously find beyond a reasonable doubt that one or more of these factors is proven by the government as to at least one count in order to further consider imposition of the death penalty. You may find that more than one of these factors is established. You should indicate your findings in Section III of your Special Verdict Forms. I will now define for you each of the statutory aggravating factors.

PECUNIARY GAIN

Title 18, United States Code, Section 3592 (c), provides that, in determining whether a sentence of death is justified for a defendant who has been found guilty of a capital offense, the jury shall consider aggravating factors alleged by the government and determine which, if any, exist. Here, the government alleges, as provided under Section 3592(c)(8) of the statute, that:

The defendant committed the offense as consideration for the receipt, or in the expectation of the receipt of anything of pecuniary value.

To establish that a defendant committed an offense as consideration for the receipt or in the expectation of the receipt of anything of pecuniary value, the government must prove that the defendant committed the offense in consideration for or in the expectation of receiving anything of pecuniary value, such as money, property, or anything else having such economic value, benefit, or advantage. There is no requirement that the government prove that something of pecuniary value actually changed hands. The words

receipt or expectation of receipt should be given their ordinary, everyday meaning which includes obtaining or expecting to obtain something.

NON-STATUTORY AGGRAVATING FACTORS

Next, you must consider for each count whether you are unanimously persuaded beyond a reasonable doubt that the government has proven any of the specified non-statutory aggravating factors. The non-statutory aggravating factors may include the effect of the offense on victims and their families, and any other specified, relevant information which weighs in favor of imposing the death penalty. Only non-statutory aggravating factors which have been specified may be considered by the jury. You are not free to consider any other factors in aggravation which have not been specified. You may find more than one of the specified non-statutory aggravating factors present. You are not required to find at least one of the non-statutory aggravating factors in order to continue your deliberations. Again, you may find that more than one of these factors has been established. However, regardless of whether or not you find any of the non-statutory aggravating factors present, you are to continue your deliberations.

In this case, as to count one, the government alleges the following three non-statutory aggravating factors:

1. Obstruction of Justice. The defendant, _____, committed the offense in an effort to insure that the victim, _____, would not be able to assist in the investigation or prosecution of him for his criminal activities.

2. Victim Impact Evidence. The defendant, _____, caused injury, loss and harm to the family of [victim] because of [victim #1 s] personal characteristics as an individual human being and the impact of [victim #1 s] death upon his family.

3. Future Dangerousness of the Defendant. The defendant, _____, is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others.

The government alleges in count two of the indictment the following two non-statutory aggravating factors:

1. Victim Impact Evidence. The defendant, _____, caused injury, loss and harm to the family of [victim #2] because of [victim #2 s] personal characteristics as an individual human being and the impact of [victim #2 s] death upon his family.

2. Future Dangerousness of the Defendant. The defendant, _____, is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others.

Again, the non-statutory aggravating factors are to guide you in assessing the effect of the offenses on the victims and their families, and any other specified, relevant information which weighs in favor of imposing the death penalty. Only the non-statutory aggravating factors which have been specified may be considered by the jury. You are not required to find at least one of the non-statutory aggravating factors in order to continue your deliberations. You may find that more than one of these factors is established. You

should indicate your findings in Section IV of your Special Verdict Forms. I will now define for you each of the non-statutory aggravating factors.

OBSTRUCTION OF JUSTICE

Title 18, United States Code, Section 3593(a), provides that the aggravating factors specified by the government may include any other relevant information. Here, the government alleges and must prove beyond a reasonable doubt that:

The defendant, _____, committed the offense in an effort to insure that the victim, _____, would not be able to assist in the investigation or prosecution of him for his criminal activities.

VICTIM IMPACT EVIDENCE

Title 18, United States Code, Section 3593(a), provides that the aggravating factors specified by the government may include the effect of the offense on the victims and the victims families. To establish this factor the government must prove beyond a reasonable doubt that:

The defendant, _____, caused injury, loss and harm to the family of [victim #1] (in count one) and [victim #2] (in count two) because of [victim #1 s] (count one) and [victim #2 s] (count two) personal characteristics as individual human beings and the impact upon the families of [victim #1] (count one) and [victim #2] (count two).

The effect of the offense on the victim means the specific harm to the victim caused by the defendant.

The victim s personal characteristics as an individual human being means who the victim was in life and those aspects of the victim s character and personality that his family would miss the most.

The impact of the death upon the victim and the victim's family means the extent and scope of the injury and loss suffered by the victim and the victim's family.

FUTURE DANGEROUSNESS OF THE DEFENDANT

Title 18, United States Code, Section 3593(a), provides that the aggravating factors specified by the government may include any other relevant information. To establish this factor the government must prove beyond a reasonable doubt that:

The defendant, _____, is likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others.

In support of this aggravating factor, the government contends that the defendant has:

1. Displayed a lack of remorse for his role in the killing of [victim #1] and [victim #2].
2. Demonstrated a low rehabilitative potential in that prior efforts to rehabilitate and/or deter him from criminal conduct have failed.
3. Shown a pattern of continuing and escalating criminal behavior.
4. Committed the offenses after substantial planning and premeditation.

Planning means mentally formulating a method for doing something or achieving some end. Premeditation means thinking or deliberating about something and deciding whether to do it beforehand. Substantial planning and premeditation means a considerable or significant amount of planning and premeditation.

STATUTORY MITIGATING FACTORS

Next you must consider any mitigating factors that may be present in this case. A mitigating factor is not offered to justify or excuse a defendant's conduct. Indeed, if a homicide was justifiable or excusable, a defendant would not be guilty of murder. A mitigating factor, instead, is intended to present facts about the defendant's background, record, character, or the circumstances surrounding the capital crimes for which he has been convicted, or other similar relevant factors, that would weigh against a sentence of death.

It is the defendant's burden to establish any mitigating factors by a preponderance of the evidence. This is a lesser standard of proof under the law than proof beyond a reasonable doubt. It means that the defendant has to produce evidence which, considered in the light of all the facts, leads you to believe that what the defendant claims is more likely true than not true. To put it differently, if you were to put the defendant's evidence and the government's evidence as to a mitigating factor on opposite sides of the scales, the defendant would have to make the scales tip slightly to his side. If the defendant fails to meet this burden, he has not proven that mitigating factor.

The mitigating factors differ from aggravating factors in another important way. Unlike aggravating factors, which the jury must unanimously find to exist, any member of the jury who finds the existence of a mitigating factor by a preponderance of the evidence may consider such factors established regardless of the number of jurors who agree that the factor has been established.

Title 18, United States Code, Section 3592(a) provides that in determining whether a sentence of death is to be imposed on a defendant, the jury shall consider any mitigating factor, including the following:

(1) Minor participation. The defendant is punishable as a principal in the offense, which was committed by another, but the defendant's participation was relatively minor, regardless of whether the participation was so minor as to constitute a defense to the charge.

(2) Other Factors. Any other factors in the defendant's background, record, or character or any other circumstance of the offense mitigating against imposition of the death sentence.

Again, the statutory mitigating factors are to guide you in assessing the defendant's background, record, character, the circumstances surrounding the capital crime for which he has been convicted or other similar relevant factors that would weigh against a sentence of death. Any member of the jury who finds the existence of a mitigating factor by a preponderance of the evidence may consider such a factor established regardless of the number of jurors who agree that the factor has been established. You may find that more than one of these factors has been established. However, regardless of whether or not you find any of the statutory mitigating factors present, you are to continue your deliberation. You should indicate your findings in Section V of your Special Verdict Forms.

NON-STATUTORY MITIGATING FACTORS

In addition to the statutory mitigating factors defined by Congress, the law also permits you to consider whether other factors in the defendant's background, record, or character or any other circumstances of the offense mitigate against imposition of a death sentence. Indeed, any one juror may consider any other factor, whether specifically argued by defense counsel or not, which that juror believes to be mitigating, regardless of the number of other jurors who may agree, if that one juror finds that such a factor has been established by a preponderance of the evidence.

In short, your discretion in considering mitigating factors is much broader than your discretion in considering aggravating factors. This was a choice expressly made by Congress in enacting the capital punishment statute at issue in this case.

You may find that more than one of these factors has been established. However, regardless of whether or not you find any of the non-statutory mitigating factors present, you are to continue your deliberation. You should indicate your findings in Section V of your Special Verdict Forms.

The defense has submitted to the Court a list of additional mitigating factors which they have endeavored to prove through the evidence they have put on at this hearing. I will discuss these factors with you now, and they will also appear on your verdict form. If any one juror finds any of these mitigating factors established by a preponderance of the evidence, regardless of the number of other jurors who may agree, then that juror should consider and weigh such mitigating factor(s) against any aggravating factors found in the case.

- (1) The Co-Defendant, _____, pulled the trigger of the firearm that caused the deaths of [victim #1] and [victim #2].
- (2) The Defendant, _____, has remorse for his involvement in the deaths of [victim #1] and [victim #2].
- (3) The Defendant, _____, has rehabilitative potential to such a degree as to warrant a sentence of life imprisonment without the possibility of release.
- (4) The Defendant, _____, was 19-years-old at the time the offenses were committed.
- (5) The life of the defendant, _____, was disrupted at an early age.
- (6) The defendant, _____, grew up without a nurturing, supportive or stable family life.
- (7) The Defendant, _____, was reared without the influence of a father or a father-figure.
- (8) The Defendant, _____, is not likely to commit criminal acts of violence in the future which would be a continuing and serious threat to the lives and safety of others.
- (9) The combination of any or all of the above mitigating factors contributed to the predisposition of the Defendant, _____, to become involved with the Co-Defendant, _____.

WEIGHING AGGRAVATION AND MITIGATION

After you have decided upon the aggravating and mitigating factors that are present as to the defendant, the law requires you to weigh those factors and to decide whether you are unanimously persuaded that the aggravating factors sufficiently outweigh any mitigating factors to justify imposing a sentence of death. You should do this with regard to each count of the indictment. Even if you determine that no mitigating factors

have been proven to exist, you must consider whether the aggravating factors that have been proven are themselves sufficient to justify imposing a sentence of death.

Only the aggravating and mitigating factors (both statutory and non-statutory) are to be considered in this weighing process. As to the aggravating factors (both statutory and nonstatutory), all jurors must consider the aggravating factors which all of you unanimously found to be proven beyond a reasonable doubt. As to the mitigating factors (both statutory and nonstatutory), each juror must consider the mitigating factors which that juror individually found to be proven by a preponderance of evidence. You are not required to consider a mitigating factor if you did not find the factor to be proven.

Passion, prejudice and any arbitrary considerations have no role to play in your efforts to reach a just result in this case. In carefully weighing the various factors at issue in this case, you are called upon to make a unique, individualized judgment about the appropriateness of imposing the death penalty on the defendant for each count. This is not a mechanical process. You should not simply count the number of aggravating and mitigating factors and reach a decision based upon which number is greater. Instead, you must consider the weight and value of each factor in making your decision.

Any one aggravating factor proven by the government, if sufficiently important in your mind, may outweigh several mitigating factors. Thus, even if you were to find only one required statutory aggravating factor proven as to the defendant, and no other aggravating factor, you would still have to weigh that aggravating factor against any mitigating factors. Or, you would have to weigh that factor alone, in the absence of any

mitigating factors. On the other hand, you must also recognize that a single mitigating factor, if sufficiently important in your mind, may outweigh several aggravating factors.

In short, what is called for in weighing the various factors is not mathematical skills, but your careful, considered and mature judgment. At this final weighing stage in the process, you are not called upon simply to find relevant factors. You are called upon to make a reasoned moral judgment based upon all the evidence before you as to whether the death penalty is justified as punishment for the defendant for each offense in the counts of conviction.

Only if you are unanimously persuaded that the aggravating factors sufficiently outweigh the mitigating factors may you return a decision in favor of capital punishment. Each individual juror must decide whether the defendant should be put to death for either capital crime, and all jurors must agree. If even one juror finds a mitigating factor present which, in that juror's mind, is not sufficiently outweighed by one or all of the aggravating factors that you have agreed were proven, then the jury may not sentence the defendant to death for a specific capital crime. If even one juror finds that a sentence of death is not justified, the jury cannot return a decision in favor of capital punishment. Separate considerations must be given to aggravating and mitigating factors in each count.

If after consideration of the aggravating and mitigating factors, it is determined that a sentence of death is justified, on either or both counts, then the defendant shall be sentenced to death. You must be unanimous in making this determination. If, after consideration of the aggravating and mitigating factors, it is determined in either or both counts, that a sentence of death is not justified, then you must determine whether the

defendant should be sentenced to life in prison without the possibility of release or, in count two only, as an additional alternative, a lesser sentence consisting of a term of years to be set by the Court in accordance with applicable law. You must be unanimous in making these determinations. You should indicate your determinations regarding the sentences in Section VI of your Special Verdict Forms.

CONSEQUENCES OF DELIBERATIONS

If, after weighing the aggravating and mitigating factors, you unanimously recommend that a sentence of death shall be imposed, then the Court is required to sentence the defendant to death. If you unanimously recommend that a sentence of life imprisonment without the possibility of release shall be imposed, then the Court is required to sentence the defendant to life imprisonment without the possibility of release. If, with respect to count two, you unanimously recommend a sentence lesser than death or life imprisonment without the possibility of release, the Court shall sentence the defendant to a lesser sentence consisting of a term of years to be set by the Court in accordance with the applicable law.

DUTY TO DELIBERATE

It is your duty as jurors to discuss the issue of punishment with one another in an effort to reach agreement, if you can do so. Each of you must decide this remaining question for yourselves, but only after full consideration of the evidence with the other members of the jury. While you are discussing this matter, do not hesitate to re-examine your own opinion, and to change your mind if you become convinced that you are

wrong. But do not give up your honest beliefs as to the weight or the effect of the evidence solely because others think differently or simply to get the case over with.

SYMPATHY

Under your oath as jurors you are not to be swayed by sympathy. You are to be guided by the evidence and the Court's instructions and your decision is to be based solely on the evidence and the Court's instructions. To arrive at a true and just verdict, you should not let sympathy interfere with your thinking.

CHARTS AND SUMMARIES

Certain charts and summaries have been used to illustrate facts brought out in the testimony of some witnesses. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

CONCLUDING INSTRUCTIONS

Remember at all times, you are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case, to decide whether the government has proven the aggravating factors beyond a reasonable doubt and the defendant has proven the mitigating factors by a preponderance of the evidence.

The foreperson will write the unanimous answer of the jury in the spaces provided. At the conclusion of your deliberations, the foreperson should date and sign the verdict forms.

If you need to communicate with me during your deliberations, the foreperson should write the message and give it to the Marshal. I will either reply in writing or bring you back into the courtroom to answer your message.

Bear in mind that you are never to reveal to any person, not even to the Court, how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict.

SIGNED this the 6th day of September, 2000.

UNITED STATES DISTRICT JUDGE